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IN THE UNITED STATES SUPREME COURT

OCTOBER 1973 - JUNE 1974 TERM

NO. 73-1355

EDWARD FRANCIS KUNTZWEILER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
Directed to the United States
Court of Appeals for the
Ninth Circuit

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TO THE HONORABLE CHIEF JUSTICE WARREN BURGER AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully petitions for a hearing before this Honorable Court to review and reverse a judgment of the United States District Court for the District of Arizona, rendered against the Petitioner in which he stands convicted of conspiracy to manufacture amphetamine and methamphetamine in violation of Title 21 U.S.C. Section 371. He was sentenced to four years imprisonment in a Federal Penitentiary.

JURISDICTION

Jurisdiction is conferred by Title 28, Sections 1254 (1), 1651, 2106, and Rule 37(b) of Federal Rules of Criminal Procedure.

The opinion of the Circuit Court of Appeals for the Ninth Circuit was issued on November 6, 1973.

A petition for rehearing was duly filed within the time allowed by law and denied on February 6, 1974.

This petition is being filed within 30 days thereafter.

The jurisdiction of this Honorable Court under Rule 19, subsection (1) of its Rules is invoked upon the grounds that a SPECIAL AND IMPORTANT REASON EXISTS FOR THE GRANTING OF HIS PETITION in that the Government has failed completely to establish that Petitioner was involved in a conspiracy to violate Title 18, U.S.C. Section 371. Petitioner calls upon this Court TO EXERCISE ITS SUPERVISORY POWERS, pursuant to Rule 19(1)(b) to the end that this unconstitutional conviction be set aside and that he will not be deprived of his liberty for a period of four years without just cause.

OPINION BELOW

The opinion of the Court dated November 6, 1973, is attached hereto as Appendix "A" and made a part hereof by reference.

The order denying the petition for rehearing, dated February 6, 1974, is attached hereto as Appendix "B" and made a part hereof by reference.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are involved:

Title 21, Section 360 a(a), United States Code.

Title 18, Section 371, United States Code.

Fifth Amendment to the Constitution of the United States.

QUESTION PRESENTED

Did this petitioner violate any law of these United States for which he should be imprisoned and deprived of his liberty for a period of four years?

THE FACTS

Given in a light most favorable to the Government, the facts upon which a conviction of the petitioner is predicated are:

One Gary Payne, with whom petitioner is charged with having entered into a conspiracy, was in the employ of Clico Scherer Company of Phoenix, Arizona. This company sold laboratory and medical supplies, including chemicals. Payne, who was so employed, and petitioner were complete strangers and met for the first time during the last week in January of 1969, when petitioner ordered some laboratory apparatus and chemicals. One of the chemicals he ordered was Phenol-2-propanone. On the occasion of this first meeting, Petitioner indicated he owned a clothing shop (which he did) and said he was going to use the chemical for leather work.

A first delivery of the merchandise ordered was made about the middle of March of 1969, and on this occasion, the only conversation that took place, according to Payne, was that the latter asked petitioner if he knew of an automobile engine that could be purchased at a reduced price. Payne said the petitioner also asked him if he would sell him certain other merchandise and only mark "cash" on the slip, and Payne testified he said he would see whether this could be done. During the period from February, 1969, to July, 1969, petitioner placed five or six orders with Clico Company, according to Payne.

The following should be borne in mind in connection with this set of facts, as it is crucial:

The first time that the subject ever came up between the petitioner and Payne as to what thechemicals were going to be used for was about the middle of June of 1969, which would have been about the time of the placement of the last order. (This was on direct examination by the Government.) Payne testified he did not know exactly by whom it was said, but the subject came up that the chemicals MIGHT be used for a drug called "speed". When he was asked if he told him how it would be made, he said, not really. Payne said the petitioner said he was very tired and that he had spent the entire day trying to get a formula, but did not say what kind of a formula he was looking for.

Payne further testified on direct that the petitioner said he would make it well worth his while if he would supply him with chemicals and that he would pay him in speed, but Payne said he declined the offer.

After Payne had declined the above offer, Payne saw petitioner one more time during the first or second week in July, 1969, and this was the last time he saw him. Payne, one Gary Brazil, and petitioner were present. Petitioner produced a white substance on a mirror. Brazil asked petitioner, "What are you going to do with that?" and Payne, under questioning by the Government, said that at that time he was asked in a polite way to leave.

With respect to Brazil, Payne further testified that Brazil had never said anything to him that he had any participation in connection with any drug or knew anything about a drug. In fact, the Government dismissed any and all charges against Brazil and he was not called to testify at the trial.

Payne was the only witness the Government produced in an effort to establish a charge of conspiracy, and it pressed no charges against the latter.

During the course of his testimony, Payne said he could not swear under oath or to an absolute certainty THAT PETITIONER WAS GOING TO MANUFACTURE SPEED OR ANY OTHER DRUG.

THE FOREGOING CONSTITUTES THE GOVERNMENT'S CASE towards the establishment of CONSPIRACY. In sum, this was the gist of his testimony:

1. From the first part of 1969 until the middle of June of 1969, Payne was selling petitioner apparatus and chemicals without any mention being made as to what use was going to be made of the chemicals except for leather work in his Boutique shop.

2. Then in the middle of June of 1969, for the first time Payne was told that the chemicals MIGHT BE USED TO MANUFACTURE SPEED.

3. Payne was offered payment in speed if he would sell the chemicals, BUT HE DECLINED THE OFFER.

4. He said the petitioner told him he was trying to track down a formula but he could not say for sure what the formula was for.

5. Later when Brazil and petitioner were engaged in a conversation, Payne was asked to leave and he did.

6. Payne said he could not connect Brazil in any way to the manufacture of drugs and the record is entirely barren of any other evidence in this regard.

On the basis of the foregoing, the Government in its indictment, notwithstanding, alleged that petitioner, Gary Payne and Gary Roger Brazil willfully and knowingly did combine, conspire, confederate and agree together and with each other to commit an offense against the United States, that is, to willfully, knowingly and unlawfully manufacture stimulant drugs, in violation of Title 21, U.S.C., Section 360, all of which the Government claims to be in violation of Title 18, U.S.C. Section 371.

REASON FOR GRANTING THE WRIT

The MAIN and CHIEF reason is that the Government has failed entirely to prove a

CONSPIRACY which is essential to a conviction under Title 18, U.S.C. Section 371. The very best that can be said and gleaned from the evidence is that if there was any attempt to manufacture a drug, the plan, if any, rested solely in the mind of the petitioner and NO OTHER PERSON. In Van Tress v. U.S. 292 F. 513, it was held that one of the alleged conspirators could not be convicted on a CONSPIRACY CHARGE WHERE HE WAS THE SOLE PLANNER.

The case is not unlike Ingram v. U.S. 360 U.S. 672, 3 L.Ed. 2d 1503, 79 S.Ct. 1314 where some of the defendants charged had intimate connections, but LIKE PAYNE in this case, they did not know for sure what was happening or what was going on. Here the best Payne could testify to was that he was told the merchandise might be used to manufacture drugs. This Court said in Ingram:

> "What was said in Direct Sales Co. v. U.S. on behalf of a unanimous Court is of particular relevance here:
>
> 'Without the knowledge, the intent cannot exist---Furthermore, to establish the intent, the EVIDENCE OF KNOWLEDGE MUST BE CLEAR, not EQUIVOCAL---. This, because charges of conspiracy, are not TO BE MADE OUT BY PILING INFERENCE UPON INFERENCE, thus fashioning a dragnet to draw in all substantive crimes.' 319 U.S. at 711, 87 L.Ed. 1674."

Further, in U.S. v. Falcone, 311 U.S. 205, 85 L.Ed. 128, 61 S.Ct. 235:

> "One does not become a conspirator by aiding the abetting it, through sales of supplies or

otherwise, UNLESS HE KNOWS OF THE CONSPIRACY, AND THE INFERENCE OF SUCH KNOWLEDGE CANNOT BE DRAWN MERELY FROM KNOWLEDGE THE BUYER WILL USE THE GOODS ILLEGALLY." Bacon v. U.S. 127 F.ed 985.

In short, direct proof is not supplied through the structure of piling an inference upon an inference. Stating it more simply, it would result into GUESSING a person into a Federal Penitentiary. It may be good guessing, BUT IT IS NOT PROOF.

The following decisions are being presented to the Court for its consideration:

In an early holding in the Ninth Circuit Marino v. U.S. 91 F.2d 691 (9th Cir. 1937), in defining a conspiracy, held:

> "It is a partnership in criminal purposes. THE GIST OF THE CRIME IS THE CONFEDERATION OR COMBINATION OF MINDS." United States v. Hirsch, 100 U.S. 33, 34, 25 L.Ed. 539; Pettibone v. U.S., 148 U.S. 197, 202, 13 S.Ct. 542, 37 L.Ed. 419; Dealy v. U.S., 152 U.S. 539, 547, 14 S.Ct. 680, 38 L.Ed. 545; Bannon et al v. U.S., 156 U.S. 464, 468, 15 S.Ct. 467, 39 L.Ed. 494; Hyde v. Shine, 199 U.S. 62, 76, 25 S.Ct. 760, 50 L.Ed. 90; Williamson v. U.S., 207 U.S. 425, 447, 28 S.Ct. 163, 52 L.Ed. 278; Brown v. Elliott, 225 U.S. 392, 401, 32 S.Ct. 812 50 L.Ed. 1136; Wong Tai v. U.S. 273 U.S. 77, 81, 47 S.Ct. 300, 301, 71 L.Ed. 545; Proffitt v. U.S. (C.C.A.9) 264 F. 299, 302; Johnson v. U.S. (C.C.A.9) 62 F.(2d) 32, 34.

In order for the conspiracy to exist, the parties must work TOGETHER UNDERSTANDINGLY with a single design for the accomplishment of a common purpose and with a preconcerted plan and purpose:

> It is sufficient if there be concert of action, all parties working together understandingly, with a single design for the accomplishment of a common purpose. 8 Cyc 621. As is said in Reilley v. United States, 106 Fed. 896, 905, 46 C.C.A. 25, 35:
>
> "If the evidence of the separate details of the transaction as it was carried out indicates with the requisite certainty the existence OF A PRECONCERTED PLAN AND PURPOSE, that is sufficient." Fowler v. U.S. 273 F.19 (9th Cir. 1921).

In order for a conspiracy to exist, it must first be shown that the parties thereto were knowing participants in any common and unlawful design:

> U.S. v. Falcone, 311 U.S. 205, 210, 85 L.Ed. 128, 132, 61 S.Ct. 235; Morrison v. Calif., 291 U.S. 82, 92, 78 L.Ed. 664, 671, 54 S.Ct. 281; Mayola v. U.S. (C.C.A.9th) 71 F 2d 65, 67; Paddock v. U.S. (C.C.A.9th) 79 F 2d 872, 875, 876; Stevens v. The White City, 285 U.S. 195, 204, 76 L.Ed. 699, 704, 52 S.Ct. 347; Gunning v. Cooley, 281 U.S. 90, 94, 74 L.Ed. 720, 724, 50 S.Ct. 231; N.Y.C.R.Co. v. Ambrose, 280 U.S. 486, 490, 74 L.Ed. 562, 565, 50 S.Ct. 198; Weniger v. U.S. (C.C.A.9th) 47 F.2d 692; U.S. v. Falcone (C.C.A.2d) 109 F 2d 579, 581, affirmed in 311 U.S. 205, 85 L.Ed. 128, 61 S.Ct. 204.

In U.S. v. Cherry, 295 F.2d 842 (1961 4th Cir.) in which a 9th Circuit Court of Appeals case is cited, the Court stated:

> "We have no quarrel with the statement of the law expounded by counsel. There must be a conspiracy and the accused must be a party to it - NOT MERELY WITHOUT KNOWING WHAT IT WAS ALL ABOUT.
>
> "On the other hand, an accused must join in the agreement to be guilty of a violation of the statute, even IF HE COMMITS AN OVERT ACT, he does not violate the statute unless HE JOINED IN THE AGREEMENT. Marino v. United States, 9th Cir., 91 F.Ed 691, 695, 113 A.L.R. 975.
>
> "It has been said over and over again that the conspiracy, NOT THE OVERT ACT, IS THE 'gist' of the crime." U.S. v. Cohen, 2 Cir., 145 F.2d 82, 94.
>
> "AN OVERT ACT ALONE IS INSUFFICIENT TO CONSTITUTE A CONSPIRACY. THERE MUST BE AN UNLAWFUL AGREEMENT TO WHICH THE...ACT IS REFERRABLE." Hall v. U.S., 10 Cir., 109 F.Ed 976, 984.

In U.S. v. Cohen, 145 F.2d 82 2d. Cir., it is stated:

> "It has been said over and over again that the CONSPIRACY, NOT THE OVERT ACT, IS THE 'gist' of the crime." U.S. v. Hirsch, 100 U.S. 33, 34, 25 L.Ed. 539; U.S. v. Britton, 108 U.S. 199, 204, 2 S.Ct. 531, 27 L.Ed. 698; Bannon v. U.S., 156 U.S. 464, 468, 15

S.Ct. 467, 39 L.Ed. 494; Joplin Mercantile Co. v. U.S., 236 U.S. 531, 535, 35 S.Ct. 291, 59 L.Ed. 750; Pierce v. U.S., 252 U.S. 239, 244, 40 S.Ct. 205, 64 L.Ed. 542; Braverman v. U.S. 317 U.S. 49, 53, 63 S.Ct. 99, 87 L.Ed. 23

In Hall v. U.S. 109 F.2d 976 10th Cir., the Court said:

> "THERE MUST BE AN UNLAWFUL AGREEMENT TO WHICH THE OVERT ACT IS REFERRABLE. The overt act must be a SUBSEQUENT INDEPENDENT ACT FOLLOWING THE CONSPIRACY AND DONE TO CARRY INTO EFFECT THE OBJECT THEREOF, and cannot succeed the completion of the contemplated crime."

In a CONSPIRACY, IT IS ALTOGETHER ESSENTIAL THAT A COMMON SCHEME MUST FIRST BE ESTABLISHED AND THE GOVERNMENT HAS THE BURDEN OF PROOF OF FIRST ESTABLISHING THIS. U.S. v. Robinson 470 F.Ed. 121 7th Cir., 1972. See also U.S. v. Zuideveld, 316 F.Ed. 873, 878 7th Cir., 1963.

The Court of Appeals found that a conspiracy was established:

1. Because petitioner purchased distillation equipment capable of producing stimulants.

2. Because appellant told one Goldstein, another laboratory company clerk, that he was working on a project that would make him a lot of money.

3. Because Goldstein obtained equipment for petitioner at Payne's request.

4. Because Payne told Goldstein he was buying the equipment as a favor to petitioner.

5. Because there were purchases of chemicals by petitioner from Payne and others.

6. Because petitioner told Payne that the chemicals MIGHT be used to make speed.

7. Because phenol-2-propanone could only be used to manufacture amphetamines.

8. Because Brazil paid Payne in cash for the chemicals.

9. Because petitioner offered Payne "speed" in payment (which the undisputed evidence shows Payne declined) for the chemicals.

10. Because Payne, knowing the purpose for which the chemicals were bought (this is not substantiated by the evidence, as Payne testified he did not know what drug would be manufactured), marked sales receipts "cash".

11. Because Payne, who also knew the petitioner as "Kay" wrote this name on the sales slips.

When the facts outlined in the Court's opinion are tested in the light of Ingram, Direct Sales, Falcone, supra, see also U.S. v. Russell (1973) 36 L.Ed 2d 366, 93 S.Ct, the latter to the effect that it is not illegal in and of itself to possess phenol-2-propanone. Further, in the light of: Marino supra A 99th Cir) holding 91 F.2d 691, defining conspiracy "as a partnership in

criminal purposes. THE GIST OF THE CRIME IS THE CONFEDERATION of combination of minds; THAT THE PARTIES MUST WORK TOGETHER UNDERSTANDINGLY, Fowler, supra, 273 F. 19 (9th Cir); Reilly, supra, 106 F. 896; THAT THERE IS NO CONSPIRACY NOR A VIOLATION OF THE CONSPIRACY STATUTE IF A PARTY HAS COMMITTED AN OVERT ACT UNLESS AN AGREEMENT EXISTS AND HE HAS JOINED IN IT. Marino, supra, 91 F.2d 691, 695, 113 A.L.R. 975; THAT IT HAS BEEN SAID OVER AND OVER THAT THE CONSPIRACY, NOT THE OVERT ACT IS THE 'gist' of the crime. U.S. v. Hirsch 100 U.S. 33, 34, 25 L.Ed. 359, and the numerous decisions of this Court following Hirsch, the opinion of the Circuit Court of Appeals is clearly erroneous.

CONCLUSION

Petitioner and his counsel dislike and are adverse to the unsavory task of having to burden this Court with this matter, being fully aware of the Court's extremely heavy case load. The stark fact remains, however, that petitioner seeks review before this Court or suffer incarceration in the Federal Penitentiary for a period of four years.

Respectfully submitted,
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
Nov 6 1973
U.S.COURT OF
APPEALS

UNITED STATES OF AMERICA, Appellee, v. EDWARD FRANCIS KUNTZWEILER, Appellant.	)	NO. 73-1738 OPINION

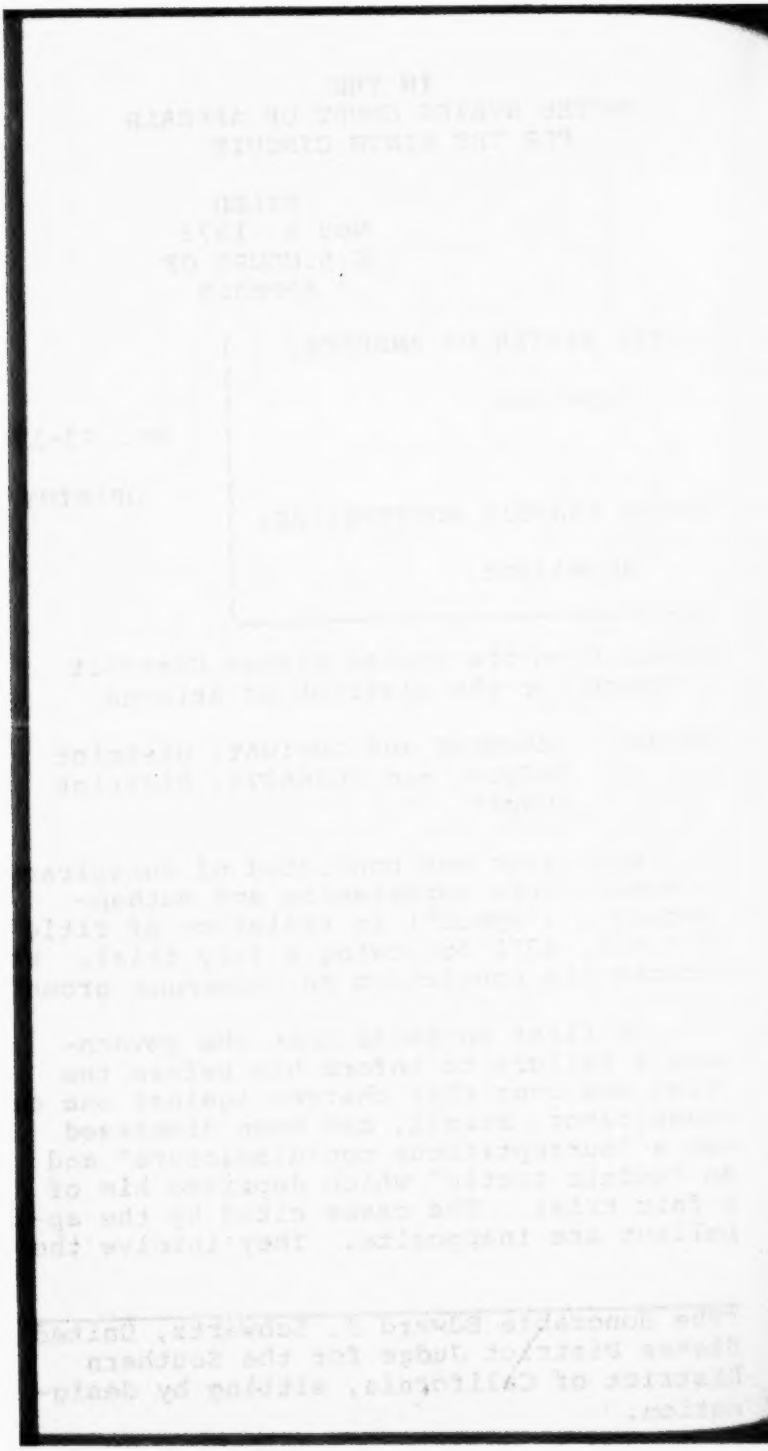
Appeal from the United States District Court for the District of Arizona

BEFORE: CHAMBERS and DUNIWAY, District Judges, and SCHWARTZ, District Judge*

Appellant was convicted of conspiracy to manufacture amphetamine and methamphetamine ("speed") in violation of Title 21 U.S.C. §371 following a jury trial. He attacks his conviction on numerous grounds.

He first contends that the government's failure to inform him before the trial was over that charges against one co-conspirator, Brazil, had been dismissed was a "surreptitious non-disclosure" and an "unfair tactic" which deprived him of a fair trial. The cases cited by the appellant are inapposite. They involve the

*The Honorable Edward J. Schwartz, United States District Judge for the Southern District of California, sitting by designation.

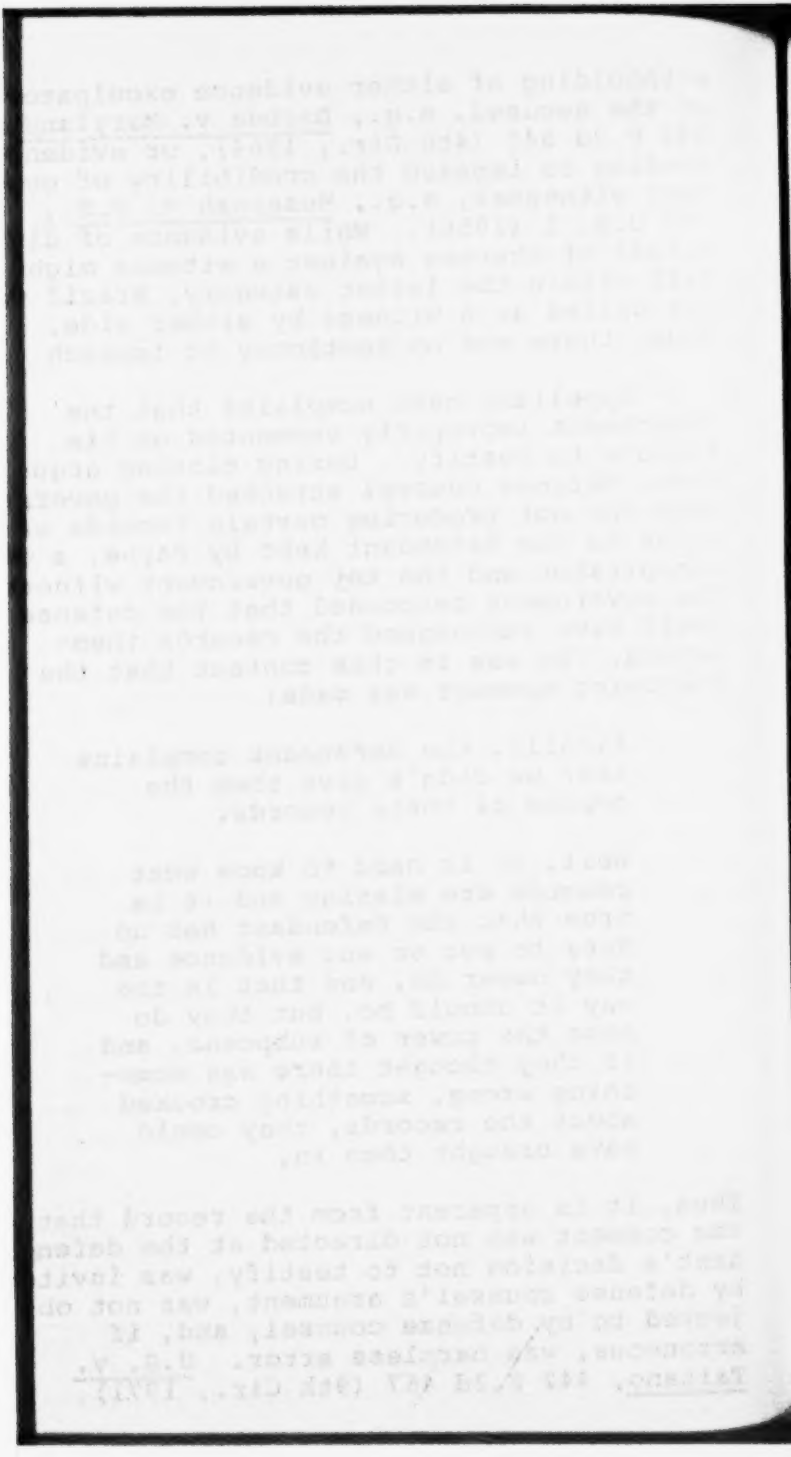


withholding of either evidence exculpatory of the accused, e.g., Barbee v. Maryland, 331 F.2d 842 (4th Cir., 1964), or evidence tending to impeach the credibility of government witnesses, e.g., Mesarosh v. U.S., 352 U.S. 1 (1956). While evidence of dismissal of charges against a witness might fall within the latter category, Brazil was not called as a witness by either side. Thus, there was no testimony to impeach.

Appellant next complains that the government improperly commented on his failure to testify. During closing argument, defense counsel attacked the government for not producing certain records of sales to the defendant kept by Payne, a co-conspirator and the key government witness. The government responded that the defense could have subpoenaed the records themselves. It was in this context that the following comment was made:

> Finally, the defendant complains that we didn't give them the copies of their records.
>
> Well, it is hard to know what records are missing and it is true that the defendant has no duty to put on any evidence and they never do, and that is the way it should be, but they do have the power of subpoena, and if they thought there was something wrong, something crooked about the records, they could have brought them in.

Thus, it is apparent from the record that the comment was not directed at the defendant's decision not to testify, was invited by defense counsel's argument, was not objected to by defense counsel, and, if erroneous, was harmless error. U.S. v. Taitano, 442 F.2d 467 (9th Cir., 1971).



Appellant's principal attack on his conviction is claimed insufficiency of the evidence to show conspiracy. Taking the evidence presented in the light most favorable to the government, the following facts emerge: Appellant purchased sitillation equipment capable of use in producing illegal stimulants from a Mr. Edward Goldstein; appellant told Goldstein that he was working on a process that would make him a lot of money. Goldstein obtained the equipment for Kuntzweiler on the request of Payne, a co-conspirator, with whom Goldstein had previously worked. Payne told Goldstein that he was buying the equipment as a favor to Kuntzweiler. There was evidence of substantial chemical purchases by appellant from Payne and others. Appellant told Payne that the chemicals might be used to make "speed" and that he was having trouble getting the formula. Expert testimony indicated that there was no use for phenol-2-propanone, one of the chemicals appellant bought from Payne, other than the manufacture of amphetamines. Co-conspirator Brazil paid Payne for this chemical in cash, Kuntzweiler taking delivery of the chemical. Appellant offered Payne "speed" in payment for the chemicals and Payne, knowing the purpose for which they were bought, marked sales receipts "cash" and used an alias for appellant in his sales records to avoid identifying the true purchaser. Brazil, Kuntzweiler and Payne jointly decided that the records should be falsified. The evidence of conspiracy was sufficient.

Finally, appellant attacks the affidavit supporting a warrant to search his premises for LSD, and makes the related claim that there was no probable cause to believe that the items seized were evidence or instrumentalities of crime. The

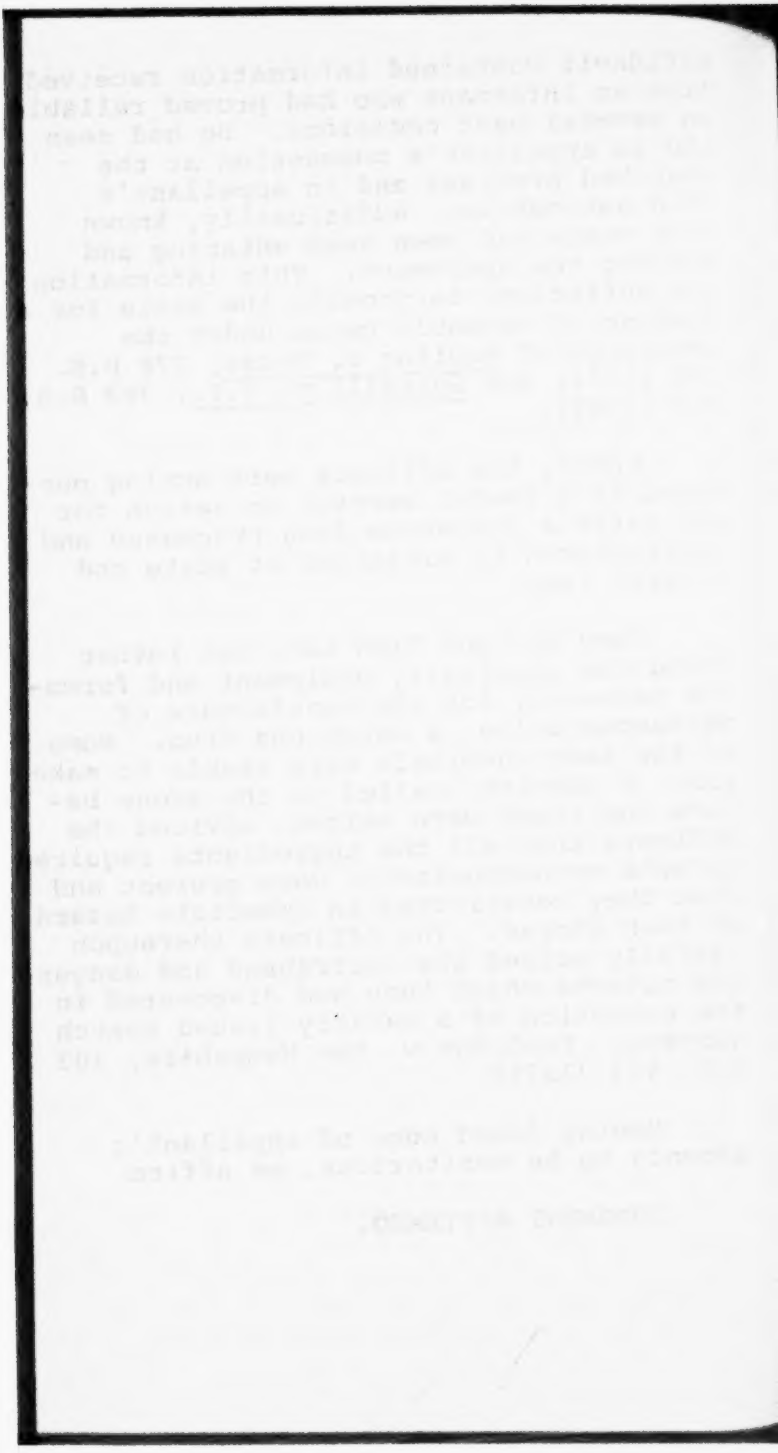
affidavit contained information received from an informant who had proved reliable on several past occasions. He had seen LSD in appellant's possession at the searched premises and in appellant's 1960 automobile. Additionally, known drug users had been seen entering and leaving the apartment. This information was sufficient to provide the basis for a finding of probable cause under the standards of Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. U.S., 393 U.S. 410 (1969).

Hence, the officers were acting pursuant to a lawful warrant to search for and seize a dangerous drug processed and manufactured in violation of state and federal law.

They did not find LSD, but rather found the chemicals, equipment and formulae necessary for the manufacture of methamphetamine, a dangerous drug. Some of the same chemicals were usable to make LSD. A chemist, called to the scene before the items were seized, advised the officers that all the ingredients required to make methamphetamine were present and that they constituted an immediate hazard as then stored. The officers thereupon lawfully seized the contraband and dangerous objects which they had discovered in the execution of a validly issued search warrant. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

Having found none of appellant's grounds to be meritorious, we affirm.

JUDGMENT AFFIRMED.



UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, vs. EDWARD FRANCIS KUNTZWEILER, Appellant.	)	NO. 73-1738

Before: CHAMBERS and DUNIWAY, Circuit Judges, and SCHWARTZ, District Judge.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

All judges of the court have been notified of the suggestion for a rehearing en banc and no judge has requested a rehearing en banc.

FILED
February 6, 1974
Clerk, U. S. Court
of Appeals

APPENDIX "B"